

United States
Court of Appeals
for the Ninth Circuit

ELLA E. HARROLD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

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PAUL P. O'BRIEN,

No. 14694

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Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

DAVID LIVINGSTON,
HAROLD R. FARROW,
JAMES R. MANSFIELD,
A. L. BJORKLUND, JR.,
2025 Russ Building,
San Francisco, California,
Counsel for Petitioner.

H. BRIAN HOLLAND,
Assistant U. S. Attorney General,
ELLIS N. SLACK,
Special Asst. to the Attorney General,
Dept. of Justice, Washington, D. C.,
R. P. HERTZOG,
Acting Chief Counsel,
CHARLES E. LOWERY,
Special Attorney,
Internal Revenue Service,
Washington 25, D. C.
Counsel for Appellee.

The Tax Court of the United States

Docket No. 40953

ELLA E. HARROLD,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES

For Petitioner:

David Livingston, Esq.

Louis F. Di Resta, Esq.

For Respondent:

C. W. Nyquist, Esq.

R. W. Whitley, Esq.

DOCKET ENTRIES

1952

May 14—Petition received and filed. Taxpayer notified. Fee paid.

May 14—Request for Circuit hearing in San Francisco filed by taxpayer. Granted 5/22/52.

May 16—Copy of petition served on General Counsel.

May 22—Entry of appearance of Louis F. Di Resta
as counsel filed.

July 15—Answer filed by General Counsel.

July 15—Request for Hearing in San Francisco,
Calif. filed by General Counsel.

July 18—Copy of answer and request served on taxpayer, San Francisco, Calif.

1953

Jan. 30—Hearing set March 23, 1953, San Francisco, Calif.

Mar. 23—Hearing had before Judge Van Fossan on parties motion to continue. Granted. Continued generally on San Francisco calendar. Motion filed and served at hearing.

Apr. 16—Transcript of Hearing 3/23/53 filed.

July 31—Hearing set Nov. 2, 1953, San Francisco, Calif.

Nov. 2—Hearing had before Judge Rice on merits. Stipulation of Facts filed. Petitioner's brief due January 4, 1954; respondent's brief due February 18, 1954. Petitioner's reply due March 19, 1954.

Nov. 25—Transcript of Hearing 11/2/53 filed.

1954

Jan. 4—Brief filed by taxpayer. Copy served 1/4/54.

Feb. 18—Answer brief filed by General Counsel.

Mar. 17—Motion for extension to April 19, 1954 to file reply brief filed by taxpayer. Granted 3/17/54.

Apr. 12—Reply brief filed by taxpayer. Copy served.

Jun. 22—Opinion filed, Judge Rice, Decision will be entered under Rule 50. Copy served.

Oct. 22—Computation filed by General Counsel.

Oct. 26—Hearing set December 1, 1954 on respondent's computation.

Nov. 26—Objections to respondent's computation filed by petitioner. Copy served 11/29/54.

1954

Nov. 26—Petitioner's computation filed. 11/29/54, copy served.

Dec. 1—Hearing had before Judge Rice on settlement under Rule 50. Ordered, decision pursuant to respondent's computation to be entered.

Dec. 7—Request for leave to file motion for further hearing to present additional evidence and for reconsideration, motion for further hearing to present additional evidence and for reconsideration lodged, filed by taxpayer.

Dec. 9—Request for leave to file motion for further hearing to present additional evidence and for reconsideration, granted. Motion for further hearing to present additional evidence and for reconsideration filed and denied.

Dec. 13—Transcript of Hearing 12/1/54 filed.

Dec. 20—Decision entered, Judge Rice, Div. 12.

1955

Feb. 1—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Feb. 8—Proof of service filed.

Feb. 8—Designation of Contents of Record with attached affidavit of service by mail filed by petitioner.

Feb. 8—Order extending time to May 2, 1955 for filing record and docketing the appeal, entered.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IRA:90-D:HM, dated February 21, 1952, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual residing at 1980 Washington Street, San Francisco, California. The returns for the periods here involved were filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on February 21, 1952.

3. The taxes in controversy are income taxes for the calendar years 1946, 1947 and 1948, and in the amounts of \$17,523.07, \$8,368.90, and \$6,991.66, respectively.

4. In determining the taxes set forth in said notice of deficiency, the following errors were committed:

(a) The Commissioner erred in holding that petitioner is chargeable with one-half community share of salary received by Ellsworth Harrold, the petitioner's husband for each of the years in question.

(b) The Commissioner erred in holding that the cost basis of the stocks sold by petitioner during

each of said calendar years, is the cost to the community.

(c) The Commissioner erred in holding that these stocks were received by the petitioner as a division of community property.

(d) The Commissioner erred in not using as a cost basis for these stocks, the fair market value of the stock when received by the petitioner.

(e) The Commissioner erred in determining a deficiency against petitioner for each of said years.

(f) The Commissioner erred in determining and assessing a deficiency for the years 1946 and 1947, because assessments for said years and each of them are barred by the statute of limitations.

(g) The Commissioner erred in holding that the five-year period of limitation for assessment provided in Section 275 (c) of the Internal Revenue Code is held to be applicable to the taxable years ended December 31, 1946 and December 31, 1947.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Petitioner and Ellsworth Harrold were married on November 27, 1936. They thereafter resided in California as husband and wife. At the time of their marriage, Ellsworth Harrold had considerable separate property including the business of distribution of Ford automobiles conducted under his name.

(b) During the early part of the year 1945 cer-

tain differences arose between Ellsworth Harrold and petitioner, and proceedings for separate maintenance were commenced by petitioner against Ellsworth Harrold in the Superior Court of the State of California, in and for the County of Sacramento. During the pendency of said proceedings, the petitioner and Ellsworth Harrold entered into an agreement for the purpose of settling their property rights and settling all claims which either may have against the other or the estate of the other. This agreement was dated June 30, 1945, and a copy thereof is attached hereto, and made a part hereof as Exhibit B.

(c) Under the provisions of said agreement Ellsworth Harrold granted to petitioner, among other property, certain shares of stock. (See paragraph 2 of the agreement.) The shares of stock on which the Commissioner seeks to adjust the cost basis to petitioner are among the shares of stock granted to petitioner by Ellsworth Harrold pursuant to that agreement.

(d) The shares of stock granted to petitioner by Ellsworth Harrold pursuant to that agreement were the separate property of Ellsworth Harrold. They were not community property.

(e) The granting by Ellsworth Harrold to petitioner of said shares of stock was not a division of community property.

(f) The granting of said shares by Ellsworth Harrold to petitioner was the consideration for the

release by petitioner of all claims that petitioner had against said Ellsworth Harrold, arising out of the marriage relationship, or otherwise.

(g) As a part of the consideration for the transfer of said stock to petitioner by said Ellsworth Harrold, petitioner agreed to a separation and released Ellsworth Harrold of any and all claims for alimony, permanent maintenance, support, alimony pendente lite, counsel fees, and costs in any domestic litigation; all claims for widow or family allowance against the estate of Ellsworth Harrold; all claims as an heir at law or next of kin; all right to inherit from Ellsworth Harrold; all rights to administrate Ellsworth Harrold's estate or to act as executrix of any will made by him; all rights in all claims to the future earnings of said Ellsworth Harrold; all rights of homestead, and all rights, titles and interests in and to any property thereafter acquired by Ellsworth Harrold, and generally all claims of any kind that petitioner might assert, based upon the marriage of petitioner and said Ellsworth Harrold.

As a further consideration, petitioner agreed to pay all outstanding obligations incurred by her during the marriage relationship and all obligations thereafter incurred by her.

(h) Pursuant to said agreement, petitioner and Ellsworth Harrold lived separate and apart.

(i) Thereafter on or about September 15, 1945, petitioner and said Ellsworth Harrold became reconciled and again lived together as husband and

wife, in the State of California, up to March, 1948, when they again separated.

(j) During the years 1946-47-48 Ellsworth Harrold received, expended and controlled the disposition of the entire salary received by him from the Ellsworth Harrold Company, and the Northern Motor Company. This is the salary, one-half of which the Commissioner has determined to be income to the petitioner for the years 1946-47-48. Petitioner did not receive said income.

(k) For the years 1946 and 1947 Ellsworth Harrold filed a separate return in which he included all of his salary as income and paid the tax thereon. Hence, the government has been paid the tax which it now seeks to collect from petitioner.

1. In April, 1948 petitioner commenced divorce proceedings in the Superior Court of the State of California, in and for the County of Sacramento. In said divorce proceedings in determining the residual community property available for distribution between Ellsworth Harrold and petitioner, the Court charged the community with a pro-rata of the total federal income tax for the years 1946, 1947 and the period January 1, to July 31, 1948. The amount of tax so charged to the petitioner was computed at the surtax rates applicable to Ellsworth Harrold's total income which included both his separate income and personal service earnings, or community income. The basis of the Court's decision in the divorce proceedings was that Ellsworth Harrold had already paid the federal income tax on this community income for the years 1946 and 1947, and

would pay the federal income tax on this community income for the period January 1 to July 31, 1948. Hence, petitioner is not properly charged with the deficiency in respect to this community income, because she has already in effect paid more than the amount due the United States Government for taxes on this income.

(m) There has been no omission from gross income of an amount which is in excess of twenty five percent (25%) of the gross income stated in petitioner's returns for the calendar years 1946 and 1947.

Wherefore petitioner prays that this Court may hear this proceeding and determine:

1. That no part of the salary or earnings of Ellsworth Harrold for the years in question, is taxable to petitioner.

2. That the cost basis of the stocks sold during the years in question is the fair market value when received by petitioner, and not the cost to the community.

3. That the assessments for the years 1946 and 1947 are barred by the statute of limitations.

4. That there is no deficiency due by petitioner for the years 1946, 1947 or 1948, or any of them.

DAVID LIVINGSTON,
LOUIS F. DiRESTA,

/s/ By DAVID LIVINGSTON,
Counsel for Petitioner

Duly Verified.

EXHIBIT A

U. S. Treasury Department, Office of Internal Revenue Agent in Charge, 74 New Montgomery St., San Francisco 5, California.

IRA:90-D:HM

Feb. 21, 1952

Mrs. Ella E. Harrold

1980 Washington St., San Francisco, Calif.

Dear Mrs. Harrold:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1946 to December 31, 1948, inclusive, discloses a deficiency of \$32,883.63 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of IRA:90-D. The signing and filing of this form will expedite the

Exhibit A—(Continued)

closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,

Commissioner

/s/ By F. M. HARLESS,

Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Agreement
Form—HM

Statement

Tax Liability for the Taxable Years Ended December 31, 1946, December 31, 1947, December 31, 1948.

Year	Deficiency
1946 Income Tax	\$17,523.07
1947 Income Tax	8,368.90
1948 Income Tax	6,991.66

Total \$32,883.63

In making this determination of your income tax liability, careful consideration has been given to your protest filed December 11, 1951.

The five year period of limitation for assessment provided in section 275(c) of the Internal Revenue Code is held to be applicable to the taxable years

Exhibit A—(Continued)

ended December 31, 1946 and December 31, 1947 since there has been an omission from gross income of an amount which is in excess of 25% of the gross income stated in your return.

ADJUSTMENTS TO NET INCOME

Year: 1946

Net income as disclosed by return.....	\$	7,465.77
Unallowable deductions and additional income:		
(a) Wages	\$	6,825.00
(b) Business income		22,380.18
(c) Capital gain		6,332.21
		35,537.39
<hr/>		
Net income as adjusted	\$	43,003.16

EXPLANATION OF ADJUSTMENTS

- (a) Income is increased by \$6,825.00 representing your one-half community share of salary received by Ellsworth Harrold, which was not included in your income as reported.
- (b) The two organizations owned by Mr. Harrold were incorporated during the year 1946. The income from this source is held to be both separate and community. Allocation is made of the community income, increasing your net income by \$22,380.18 as follows:
- | | | |
|----------------------------------------------------|----|--------------|
| Total income for period Jan. 1 to May 31, 1946.... | \$ | 96,258.86 |
| Average investment | | \$249,881.52 |
| Basis for allocation: | | |
| Allowance for salary..... | \$ | 9,050.00 |
| 10% return on investment reduced | | |
| to five months | | 10,411.75 |
| | | 53.5% |
| <hr/> | | |
| Total | \$ | 19,461.75 |
| | | 100% |
| Community income—46.5% of \$96,258.86..... | \$ | 44,760.37 |
| Your one-half community share..... | \$ | 22,380.18 |
- (c) It is held that the cost basis of the stocks sold during the year is the cost to the community, since these stocks were received by you as a division of the community property. Your income is therefore increased by \$6,332.22 due to the adjustment of the cost basis as shown below:

Exhibit A—(Continued)

	Date Acquired	Date Sold	Sales Price	Cost Basis	Gain
100 shares Allegheny Ludlum	6-30-45	3-27-46	\$4,365.41	\$2,246.75	\$ 2,118.66
100 shares Briggs Manufacturing Co.	6-30-45	3-27-46	4,801.81	2,913.93	1,887.88
200 shares Congoleum Nairn	6-30-45	10-11-46	5,975.88	4,624.87	1,351.01
100 shares McKesson Robbins	6-30-45	3-27-46	4,819.19	2,456.69	2,362.50
100 shares Standard Oil of California	6-30-45	3-27-46	4,839.21	9,038.70	6,214.37
100 shares Standard Oil of California	6-30-45	5-28-46	4,851.68		
100 shares Standard Oil of California	6-30-45	10-18-46	5,562.18		
Long-term capital gain realized on sale of stock.....					\$13,934.42
Long-term capital gain recognized—50%.....					\$ 6,967.21
(1) Long-term capital gain recognized on sale of service station					7,352.53
Total long-term capital gain.....					\$ 14,319.74
Long-term capital gain reported.....					7,987.52
Increase					\$ 6,332.22
(1) The long-term capital gain on the sale of the serv- ice station has been adjusted as follows:					
Sales price					\$ 20,000.00
Less: Expense of sale.....					190.83
Net sales price					\$ 19,809.17
Cost basis:					\$6,922.00
Less depreciation allowable.....					1,817.90
Long-term capital gain realized.....					\$ 14,705.07
Long-term capital gain recognized—50%.....					\$ 7,352.53

Exhibit A—(Continued)

COMPUTATION OF ALTERNATIVE TAX

Year: 1946

Net income	\$ 43,003.16
Less: Excess of net long-term capital gain over net short-term capital loss	9,637.37
Ordinary net income	\$ 33,365.79
Less: Exemptions	500.00
Normal tax and surtax net income.....	\$32,865.79
Tentative tax	\$ 15,022.76
Less 5% of \$15,022.76	751.14
Partial tax	\$ 14,271.62
50% of excess of net long-term capital gain over net short-term capital loss	4,818.69
Alternative tax	\$ 19,090.31

COMPUTATION OF TAX

Year: 1946

Net income	\$ 43,003.16
Less: Exemption	500.00
Normal tax and surtax net income.....	\$ 42,503.16
Combined tentative normal tax and surtax.....	\$ 21,467.18
Less: 5% of tentative tax.....	1,073.36
Total tax	\$ 20,393.82
Alternative tax	\$ 19,090.31
Correct income tax liability.....	\$ 19,090.31
Income tax disclosed by return, page 1, line 7, Original, Account No. 3025319	
First California District	1,567.24
Deficiency of income tax.....	\$ 17,523.07

Exhibit A—(Continued)

ADJUSTMENTS TO NET INCOME

Year: 1947

Net income as disclosed by return.....	\$	2,731.50
Unallowable deductions and additional income:		
(a) Salary	\$14,005.00	
(b) Long-term capital gain.....	6,883.92	
(c) Medical expense	638.93	21,527.85
Net income as adjusted.....	\$	24,259.35

EXPLANATION OF ADJUSTMENTS

- (a) Income is increased by \$14,005.00 representing your one-half community share of salary received by Mr. Ellsworth Harrold, which was not included in income as reported.
- (b) As explained under item (c) for the year 1946, long-term capital gain has been increased by \$6,883.92, due to the adjustment of cost basis to the community property, as follows:

	Date Acquired	Date Sold	Selling Price	Cost Basis	Gain
50 shares Allegheny Ludlum	6-30-45	12-24-47	\$1,565.36	\$1,123.38	\$ 442.48
100 shares Standard Oil of California	6-30-43	9- 2-47	5,861.43	3,012.93	2,848.50
500 shares Standard Oil of California			22,996.64	12,051.72	10,944.92
50 shares Allegheny Ludlum			2,176.36	1,123.38	1,052.98
Long-term capital gain realized.....					\$15,288.88
Long-term capital gain recognized—50%.....					\$ 7,644.44
Long-term capital gain reported.....					760.52
Increase					\$ 6,883.92

- (c) Medical expenses are allowable in excess of 5% of the adjusted gross income. Since the total medical expenses paid do not exceed 5% of the adjusted gross income as corrected the amount claimed of \$638.93 is disallowed.

Exhibit A—(Continued)

COMPUTATION OF ALTERNATIVE TAX

Year: 1947

Net income	\$24,259.35
Less: Excess of net long-term capital gain over net short-term capital loss.....	6,863.94
Ordinary net income.....	\$17,395.41
Less 1 exemption at \$500.00.....	500.00
Normal tax and surtax net income.....	\$16,895.41
Tentative tax	\$5,647.71
Less: 5%	282.39
Partial tax	\$5,365.32
50% of excess of net long-term capital gain over net short-term capital loss	3,431.97
Alternative tax	\$8,797.29

COMPUTATION OF TAX

Year: 1947

Net income	\$ 24,259.35
Less: Exemption	500.00
Normal tax and surtax net income.....	\$ 23,759.35
Combined tentative normal tax and surtax.....	\$ 9,418.02
Less: 5% of tentative tax	470.90
Total tax	\$ 8,947.12
Alternative tax	\$ 8,797.29
Correct income tax liability.....	\$ 8,797.29
Income tax disclosed by return, page 1, line 7	
Original, Account No. 2000881	
First California District	428.39
Deficiency of income tax.....	\$ 8,368.90

Exhibit A—(Continued)

ADJUSTMENTS TO NET INCOME

Year: 1948

Net income as disclosed by return.....	\$	4,381.25
Unallowable deductions and additional income:		
(a) Salary	\$18,420.00	
(b) Long-term capital gain	403.73	18,823.73
Net income as adjusted	\$	23,204.98

EXPLANATION OF ADJUSTMENTS

- (a) Income is increased by \$18,420.00 representing your one-half community share of salary received by Mr. Ellsworth Harold, which was not included in your income as reported.
- (b) Long-term capital gain is increased by \$403.73, computed as follows:
- | | | |
|--------------------------------------------|----|----------|
| 100 shares Blake and Decker: | | |
| Cost basis claimed | \$ | 2,725.00 |
| Cost basis to community..... | | 1,917.55 |
| Long-term capital gain realized | \$ | 807.45 |
| Long-term capital gain recognized—50%..... | | 403.73 |

COMPUTATION OF INCOME TAX

Year: 1948

Net income	\$	23,204.98
Less 1 exemption at \$600.00.....	600.00	
Normal tax and surtax net income.....	\$	22,604.98
Tentative tax	\$	8,736.94
Less: 17% on \$400.00.....	\$	68.00
12% on \$8,336.94	1,000.43	1,068.43
Correct income tax liability.....	\$	7,668.51
Income tax disclosed by return		
Original, Account No. 21696926		
First California District.....		676.75
Deficiency in income tax.....	\$	6,991.66

EXHIBIT B

This Agreement, made this 30th day of June, 1945, between Ellsworth Harrold of Sacramento, California, as First Party, and Ella Elizabeth Harrold of Sacramento, California, as Second Party,

Witnesseth:

That, Whereas, the parties hereto are, and for some time last past have been, husband and wife, but certain differences have arisen between them which render it impossible for them to continue living together; and

Whereas, it is desirable mutually for the parties hereto to settle all of their property rights in the premises and those arising out of the marriage relationship, and to settle all claims which one might have against the other or the estate of the other,

Therefore It Is Agreed:

1. First Party hereby grants to Second Party as her sole and separate property, all of his right, title and interest in and to all of that certain real property situate, lying and being in the City of Sacramento, County of Sacramento, State of California, and known, designated and described as:

All that portion of Section 13, Township 8 North Range 4 East, Mount Diablo Base and Meridian, described as follows:

Beginning at a point on the Southerly line of the property conveyed to the City of Sacramento by deed recorded in the office of the County Recorder of Sacramento County on March 13, 1934, in Book 472 of Official Records, page 31, said point being

Exhibit B—(Continued)

located on the Westerly line of the 150 feet right of way of the Western Pacific Railroad Company where said right of way changes to 100 feet in width and which point is located South $77^{\circ} 15'$ West 150 feet from the Southwest corner of West Curtis Oaks Addition, as shown on the official map recorded in the office of the County Recorder of Sacramento County, May 3, 1911, in Book 12 of Maps, Map No. 19; thence from said point of beginning North $74^{\circ} 29\frac{1}{2}'$ West 80.39 feet along the Southerly line of the property conveyed to the City of Sacramento to a point in the Easterly line of Freeport Boulevard; said point being located South $70^{\circ} 35\frac{1}{4}'$ East 40.09 feet from a stone monument set by the City Engineer of said City of Sacramento to mark the center line intersection of Freeport Boulevard and Vallejo Way; thence South $15^{\circ} 30\frac{3}{4}'$ West 120.00 feet along the Easterly line of Freeport Boulevard to the Northwesterly corner of the property conveyed by Ellsworth Harrold and Ella E. Harrold to Dallman Supply Company by deed dated September 14, 1942, recorded September 19, 1942, in Book 967 of Official Records, page 444; thence along the Northerly line of said property South $72^{\circ} 59'$ East 147.02 feet to a point in the Westerly line of the 150 foot right of way of said Western Pacific Railroad Company, thence North $12^{\circ} 45'$ West along said right of way line to the point of beginning.

2. First Party hereby grants to Second Party as her sole and separate property, all of his right,

Exhibit B—(Continued)

title and interest in and to all of the following described personal property, to-wit:

- 200 shares of Allegheny-Ludlum Stock
- 100 shares of Black & Decker stock
- 200 shares of Briggs Manufacturing Co. stock
- 200 shares of Congoleum Nairn stock
- 100 shares of Pacific Lighting Co. stock
- 2000 shares of Yuba Consolidated Gold Fields stock
- 1000 shares of Standard Oil Company of California
- 100 shares of McKessen & Robbins stock
- 1940 Lincoln Sedan, being the automobile previously and now driven and possessed by Second Party.

All community property located at 1050 45th Street, Sacramento, California, and particularly inventoried on the schedule hereunto attached and marked Exhibit "A".

3. Second Party hereby grants to First Party as his sole and separate property, all of her right, title and interest in and to all of that certain real property situate, lying and being in the City of Sacramento, County of Sacramento, State of California, and known, designated and described as:

Parcel 1: The South 60 feet and the North 100 feet of Lot 4, in the block bounded by "V" and "W", Twenty-first and Twenty-second Streets of the City of Sacramento, according to the official map or plan of said city.

Parcel 2: Lot 4, in the block bounded by "R" and "S" Fourth and Fifth Streets of the City of

Exhibit B—(Continued)

Sacramento, according to the official map or plan of said city.

Parcel 3: The North $\frac{3}{4}$ of the West 56 feet and all of the East 24 feet of Lot 2; West $\frac{1}{2}$ of Lot 3 in the block bounded by "F" and "G", Eleventh and Twelfth Streets of the City of Sacramento, according to the official map or plan of said city.

Parcel 4: Lots 7 and 8, in the block bounded by "J" and "K", Twenty-first and Twenty-second Streets of the City of Sacramento, according to the official map or plan of said city.

Parcel 5: The South 30 feet of Lot 1904, and the North 60 feet of Lot 1905 of Wright & Kimbrough Tract No. 24, as shown on the official plat of Wright & Kimbrough Tract, recorded in the office of the County Recorder of Sacramento County on July 24, 1913, in book 14 of Maps, Map No. 37, in the City of Sacramento, County of Sacramento, State of California.

Parcel 6: Lots 7305, 7314, 7315, 7316, 7317, 7318, 7319, 7320, as shown on the official "Plat of Casa Alameda Tract", recorded in the office of the County Recorder of said Sacramento County, May 4, 1906, in Book 7 of Maps, Map No. 6, and a strip of land designated as an "alley" lying contiguously along the west line of Lots 7313, 7314, 7315 and 7316, and the east line of Lots 7317, 7318, 7319 and 7320 as shown on the official "Plat of Casa Alameda Tract", described as:

Beginning at the southwest corner of Lot 7316 thence northerly along the west line of Lots 7316,

Exhibit B—(Continued)

7315, 7314 and 7313 to the northwest corner of Lot 7314; thence westerly 20 feet to the northeasterly corner of Lot 7317; thence southerly along the easterly line of Lots 7317, 7318, 7319 and 7320 to the southeast corner of Lot 7320; thence easterly 20 feet to the point of beginning.

Saving and Excepting that portion of Lots 7315 and 7316 of said subdivision described as follows: Beginning at the southwest corner of said Lot 7316; thence northerly along the westerly line of said Lots 7316 and 7315 a distance of 80.07 feet; thence easterly parallel with the southerly line of said Lot 7316 a distance of 70.10 feet; thence southerly parallel with the west line of said Lots 7315 and 7316 a distance of 80.07 feet to the southerly line of said Lot 7316; thence westerly along the southerly line of said Lot 7316 a distance of 70.10 feet to the point of beginning.

4. Second Party hereby grants to First Party, as his sole and separate property, all of her right, title and interest in and to the business operated by First Party under the name of "Ellsworth Harrold" and under the name "Northern Motor Co.", in the City of Sacramento, California, including real estate, leases, good will, accounts receivable, inventories, machinery, automobiles, fixtures, equipment, and all other assets thereof.

5. With the exception of the items specifically described in paragraphs 1 and 2 of this agreement, Second Party hereby waives and releases all rights,

Exhibit B—(Continued)

titles and interest that she may have in any asset now owned or controlled by First Party, whether described in this agreement or not, including but not confined to real estate within or without the State of California, life insurance policies, bank accounts, stocks, bonds, furnishings, accounts and earnings to the date hereof.

6. First Party shall execute and deliver to Second Party a deed of conveyance to the real property herein set aside to her, the registration certificate for the Lincoln automobile, and proper transfers of all of the stocks heretofore set aside to Second Party. Revenue stamps shall be provided by First Party. Second Party shall execute and deliver to First Party a quit-claim deed covering the six (6) parcels of real estate described in paragraph No. 3 of this agreement, and she shall execute and deliver acquittances of all outstanding policies of life insurance upon the life of First Party.

The parties shall, at any time or times hereafter, make, execute and deliver any and all such further or other instruments, papers, or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions and agreements hereof.

7. First Party shall bear all claims and demands which have been assessed against him in connection with the operation of his business by the War Labor Board and the Office of Price Administration of the United States, and shall hold Second Party and

Exhibit B—(Continued)

any property hereby set aside to her free and clear therefrom.

8. First Party will bear and pay all taxes upon the community income earned and realized up to the date of this agreement, and he shall be entitled to any and all credits and refunds for prepayment or overpayment. Each party shall bear and pay all taxes upon the separate income of each and all income hereafter realized by Second Party from any of the items specifically described in paragraphs 1 and 2 of this agreement shall be her separate property, and all taxes thereon shall be borne and paid by her. In connection herewith it is agreed that the firm of Barton, Nathanson & Barton shall be employed by each of the parties hereto for the purpose of preparing their respective 1945 State and Federal Income Tax Returns and that First Party shall report to that firm the portion of earnings from January 1, 1945 up to the date of this agreement which are allocable to the community, to the end that one-half ($1\frac{1}{2}$) thereof may be reported upon the separate return of First Party, and Second Party will report to the same firm her individual earnings and exemptions and pay such portion of her State and Federal income taxes as would have been paid had there not been added thereto her allocable portion of the community earnings from January 1, 1945, to the date of this agreement, while First Party shall pay the additional State and Federal income taxes chargeable to her by reason of the inclusion in her separate return

Exhibit B—(Continued)

of her allocable portion of the said community earnings from January 1, 1945 to the date of this agreement. Against said payment by First Party there shall be given full credit for all 1945 estimated income tax installments which heretofore have been made or hereafter may be made.

9. Each party shall pay and discharge his respective attorney's fees in the action now pending between them for separate maintenance, provided, however, that First Party is not entitled to reimbursement for fees or expenses previously paid, and likewise any action for divorce.

10. It shall be lawful for each of the parties hereto at all times hereafter to live separate and apart from the other, and free from all marital control or authority as though each was sole and unmarried.

Neither of the parties shall molest or annoy the other, or compel or endeavor to compel the other to cohabit or to dwell with him or her, as the case may be, by any legal or other proceedings for restoration of conjugal rights or otherwise.

11. Second Party shall and does hereby waive, release and relinquish unto First Party any and all claims that she may now or hereafter have against him for alimony; alimony pendente lite; permanent maintenance; support; counsel fees in the action now pending, or which may be instituted hereafter between said parties based upon the marital status or involving the same or any right incidental thereto; costs of suit in any of such action or actions,

Exhibit B—(Continued)

except as hereinabove provided; all claims for widow or family allowance against the estate of First Party if deceased; all claims as heir at law or next of kin, or as legatee or devisee in any will; all right to inherit from First Party; any right to administer First Party's estate, or to act as executrix of any will executed by First Party; all rights in, or claims to the future earnings of First Party; all rights of homestead; all rights to claim any probate homestead; all rights, titles, and interests in or to any property, real, personal or mixed, hereafter acquired by First Party; and generally all claims of whatever description that Second Party might assert based upon the marriage of the parties hereto.

12. First Party does hereby waive and relinquish unto Second Party all of his claims against her, her property and her estate, including all and singular those enumerated in paragraph 11 above, all waivers in said paragraph being intended by said parties to be mutual and reciprocal.

13. Second Party shall pay all outstanding obligations heretofore incurred by her and all obligations hereafter incurred by her and she shall save First Party safe and harmless therefrom. Conversely, First Party shall pay all outstanding obligations heretofore incurred by him and all obligations hereafter incurred by him, and he shall save Second Party safe and harmless therefrom.

In Witness Whereof, the parties hereto have here-

Exhibit B—(Continued)

unto set their hands and seals the day and year first above written.

[Seal] ELLSWORTH HARROLD,
First Party

[Seal] ELLA ELIZABETH HARROLD
Second Party

State of California,
County of Sacramento—ss.

On this 30th day of June, in the year one thousand nine hundred and forty-five, before me, Marion Fritz, a Notary Public in and for the County of Sacramento, personally appeared Ellsworth Harold known to me to be the person whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal the day and year in this certificate first above written.

[Seal] MARION FRITZ,
Notary Public in and for the County of Sacramento, State of California.

State of California,
County of Sacramento—ss.

On this 30th day of June, in the year one thousand nine hundred and forty-five, before me, Ralph H. Lewis, a Notary Public in and for the County of Sacramento, personally appeared Ella Elizabeth

Exhibit B—(Continued)

Harrold known to me to be the person whose name is subscribed to the within instrument, and she duly acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[Seal] RALPH H. LEWIS,
Notary Public in and for the County of Sacra-
mento, State of California.

[Endorsed]: T.C.U.S. Filed May 14, 1952.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above petitioner, admits, denies and alleges as follows:

1 to 3, inclusive. Admits the allegations contained in paragraphs 1 to 3, inclusive, of the petition.

4, to g, inclusive. Denies the allegations of error contained in paragraph 4, a to g, inclusive, of the petition.

5, a. Denies for lack of information the allegations contained in paragraph 5, a of the petition.

b. Admits that during the year 1945 proceedings for separate maintenance were commenced by petitioner against Ellsworth Harrold in the Superior Court of the State of California, in and for the County of Sacramento; admits that during the pendency of said proceedings, the petitioner and Ellsworth Harrold entered into an agreement; admits that this agreement was dated June 30, 1945, and a copy thereof is attached to the petition as Exhibit B; denies for lack of information the remaining allegations contained in paragraph 5, b of the petition.

c. Denies for lack of information the allegations contained in paragraph 5, c of the petition.

d to g, inclusive. Denies the allegations contained in paragraph 5, d to g, inclusive, of the petition.

h to l, inclusive. Denies for lack of information the allegations contained in paragraph 5, h to l, inclusive, of the petition.

m. Denies the allegations contained in paragraph 5, m of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

7. Further answering, respondent alleges that on the Federal income tax return filed by the petitioner for each of the calendar years 1946 and 1947 the petitioner omitted from gross income an amount properly includible therein which was in excess of 25 per centum of the amount of gross income stated in the return for each of said years, and by reason thereof the provisions of section 275(c) of the In-

ternal Revenue Code are applicable in determining the period of limitations upon assessment and collection.

8. The facts upon which respondent relies in support of the allegations in paragraph 7, *supra*, are as follows:

(a) On the Federal income tax return filed by the petitioner for the calendar year 1946 the petitioner stated gross income in the amount of \$8,465.15. Petitioner's gross income for said year was in fact not less than \$43,003.16.

(b) On the Federal income tax return filed by the petitioner for the calendar year 1947 the petitioner stated gross income in the amount of \$4,121.49. Petitioner's gross income for said year was in fact not less than \$24,259.35.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of
Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel

T. M. Mather, Charles W. Nyquist, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed July 15, 1952.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

(a) It is hereby stipulated and agreed that the issues raised by petitioner in the assignments of error contained in subparagraphs 4b, 4c, and 4d of the petition with respect to petitioner's cost basis and gain on the sale of certain capital assets shall be disposed of by including in income for each of the taxable years in controversy total net long term capital gains recognized in the amounts set forth in the last column, *infra*.

Year	As reported on returns	As determined in deficiency notice	As hereby stipulated
1946	\$7,987.52	\$14,314.74	\$11,153.66
1947	760.62	7,644.44	5,794.17
1948	None	403.73	333.96

(b) The petitioner hereby abandons the issue relating to the statute of limitations raised in the assignments of error contained in subparagraphs 4f and 4g of the petition.

(c) The remaining issue is whether one-half of the salary received by Ellsworth Harrold during the years before the Court is taxable to the petitioner as her community share of said income. It is mutually agreed, by and between the parties hereto, by their respective counsel, that this issue shall be submitted to the Court for decision on the following facts, which are hereby stipulated to be true:

1. The petitioner is an individual residing at 1980 Washington Street, San Francisco, California. Her returns for the periods here involved were filed

with the Collector for the First District of California.

2. Petitioner and Ellsworth Harrold were married on November 27, 1936. They thereafter resided in California as husband and wife.

3. During the early part of the year 1945 certain differences arose between Ellsworth Harrold and petitioner and proceedings for separate maintenance were commenced by petitioner against Ellsworth Harrold. During the pendency of said proceedings, the petitioner and Ellsworth Harrold entered into a property settlement agreement dated June 30, 1945. A copy of said agreement is attached to the petition as Exhibit B thereof.

4. Thereafter on or about September 15, 1945, petitioner and said Ellsworth Harrold became reconciled and again lived together as husband and wife in the State of California.

5. The petitioner and Ellsworth Harrold filed separate individual federal income tax returns for the calendar years 1946, 1947 and 1948.

6. Mr. Harrold was the owner of two business enterprises and in 1946 he procured them to be separately incorporated and the shares of stock thereof issued to him.

7. The net income of said businesses, up to the time of incorporation, and the salary received thereafter from the corporations by Mr. Harrold, were reported by him as his separate income, in the federal and state returns filed by him during the years

1946, 1947 and 1948. Mr. Harrold paid taxes on the income so received by him together with income received by him from various other sources.

In the returns filed by the petitioner, none of said income or salary was reported.

8. A second separation occurred on or about March 25, 1948, and a suit for divorce was instituted by the petitioner. An interlocutory decree of divorce was handed down by the Superior Court of the State of California, in and for the County of Sacramento, on February 15, 1949.

9. In said divorce proceeding, the Superior Court of the State of California confirmed the property settlement agreement dated June 30, 1945, insofar as it effected transfers of property owned by the parties at that time, and said Court further determined that the income from the personal services of Ellsworth Harrold subsequent to September 15, 1945 (the date of the reconciliation) was community property. The decree in the divorce action determined to be community property a portion of the net income of said businesses prior to incorporation as aforesaid, and all the salary received by Mr. Harrold as aforesaid. There were deducted from said community property various items including living expenses and the amount of income taxes, federal and state, paid by Mr. Harrold on the basis of his said returns. After the deduction thereof, the Court ordered equal division of the residual property between petitioner and Mr. Harrold, awarding them each \$867.12.

10. Subsequent to the entry of said decree, Mr. Harrold filed with the Internal Revenue Bureau amended income tax returns for 1946, 1947 and 1948. In said returns he reported one-half of his salary received after incorporation and one-half of the portion of the income prior to incorporation which was attributable to his personal services. He also filed claims for refund of a portion of the federal income taxes paid by him for said years 1946, 1947 and 1948, based on the theory that he had erroneously overstated his income for said years by including in his return Mrs. Harrold's community share of said income from said businesses. Thereafter and during the course of the consideration of the claim for refund, the Commissioner determined that the remaining one-half thereof should be added to the income reported in Mrs. Harrold's returns for 1946, 1947 and 1948.

Allowance of said claims for refund filed by Mr. Harrold would result in overpayments of the taxes paid by him for the years 1946, 1947 and 1948 in an amount in excess of the total of the deficiencies asserted against the petitioner for the same period.

/s/ DAVID LIVINGSTON,
Counsel for Petitioner

/s/ KENNETH W. GEMMILL,
Acting Chief Counsel, Bureau of
Internal Revenue
Counsel for Respondent

[Endorsed]: T.C.U.S. Filed Nov. 2, 1953.

[Title of Tax Court and Cause.]

OPINION

Filed June 22, 1954.

Petitioner and her former husband, residents of California, reported only their separate incomes on their individual returns for 1946, 1947, and 1948, although they were married and living together during these years. The Superior Court of California determined, during divorce proceedings, that a portion of her former husband's income for these years was community property. Petitioner was awarded one-half of such community property after the deduction of various items, including living expenses and the amount of Federal and State income taxes, paid by her former husband. Respondent determined deficiencies in petitioner's income taxes for these years because of her failure to include such community income in her returns. Petitioner's former husband filed a claim for refund based on the erroneous inclusion of his former wife's share of community income in his returns.

Held, petitioner is liable for the payment of taxes on her share of community income, and the respondent cannot be required to apply an overpayment by her former husband to petitioner's deficiencies.

David Livingston, Esq., for the petitioner.

Charles W. Nyquist, Esq., for the respondent.

Opinion

Rice, Judge: This proceeding involves deficiencies in income tax determined against Ella E. Harrold (hereinafter referred to as petitioner) as follows:

Year	Deficiency
1946	\$17,523.07
1947	8,368.90
1948	6,991.66

The sole issue to be decided is whether respondent erred in charging petitioner with one-half of the community income received by her former husband in 1946, 1947, and 1948, although her former husband reported the total of such income on his returns for these years and paid taxes thereon.

The parties have reached agreement on various other issues raised in the pleadings, and such agreement will be taken into account under a Rule 50 computation.

All of the facts were stipulated, are so found, and are incorporated herein by this reference.

Petitioner is an individual residing in San Francisco, California. Her returns for the years here involved were filed with the collector of internal revenue for the first district of California.

Petitioner and Ellsworth Harrold (hereinafter referred to as Harrold) were married in 1936, and thereafter resided in California as husband and wife. During 1945 certain differences arose between petitioner and Harrold, and she commenced an action for separate maintenance. During the pendency of said proceedings, petitioner and Harrold entered

into a property-settlement agreement dated June 30, 1945. However, on or about September 15, 1945, they became reconciled and again lived together as husband and wife in the State of California.

The petitioner and Harrold filed separate, individual, Federal income tax returns for the calendar years 1946, 1947, and 1948. Harrold was the owner of two business enterprises. In 1946 he caused them to be separately incorporated, and the shares of stock thereof issued to him. He reported the net income of said businesses, up to the time of incorporation, and the salary received thereafter from the corporations as his separate income on his returns for 1946, 1947, and 1948. He paid taxes on the income so received together with income received by him from various other sources.

In the returns filed by the petitioner for these years, none of said income or salary was reported.

A second separation occurred during March 1948, and a suit for divorce was instituted by petitioner. On February 15, 1949, an interlocutory decree of divorce was handed down by the Superior Court of the State of California, in and for the County of Sacramento. In said divorce proceeding, the Superior Court confirmed the property-settlement agreement dated June 30, 1945, insofar as it effected transfers of property owned by petitioner and Harrold at that time.

The Superior Court further determined that the income attributable to the personal services of Harrold subsequent to September 15, 1945 (the date of the reconciliation), was community property. An ad-

judication was accordingly made that a portion of the net income of his two business enterprises prior to their incorporation, and the entire salary received by him after the incorporation constituted community property.

In determining the residual amounts of such community property to be divided between petitioner and Harrold, the Superior Court deducted from and charged the community property with various items, including living expenses and the amount of Federal and State income taxes paid by Harrold. After such deductions were made, the balance amounted to \$1,734.24. One-half of this amount was awarded to petitioner as her share of the residual community property.

After the entry of the divorce decree, Harrold filed amended income tax returns for 1946, 1947, and 1948. In said returns he reported one-half of the portion of the business income, prior to incorporation, which was attributable to his personal services and one-half the salary he received after incorporation. He also filed claims for refund of a portion of the Federal income taxes paid by him for these three years, based on the theory that he had erroneously overstated his income for said years by including in his returns petitioner's community share of the income from said businesses.

During the course of the consideration of this claim for refund, the Commissioner determined that one-half of the community income during 1946, 1947, and 1948 should be added to the income reported in petitioner's returns for these years.

Allowance of the claim for refund filed by petitioner's former husband would result in overpayments for the years 1946, 1947, and 1948 in an amount in excess of the total of the deficiencies asserted against the petitioner for the same period.

Petitioner argues that, despite the decree of the Superior Court of the State of California that the income of her former husband attributable to his personal services was community property, no part of such income is now taxable to her. Her theory is that the entire tax on this income has already been paid by her former husband, the manager of the community, out of community funds. She suggests that any overpayment in his taxes, for the years in issue, resulting from the mistaken inclusion in his returns of his wife's share of such community income, be used as a set-off against her deficiencies arising out of her failure to report such community income.

Petitioner is clearly liable, under the operation of the community property laws of California, for taxes on her half of the community income earned by her former husband during the years in issue. As we stated in *Marjorie Hunt*, 22 T. C. —, filed April 30, 1954:

* * * This liability is fixed and definite. It is not a means of splitting income which may be voluntarily chosen or elected to minimize taxes. The wife may not, at her option, return one-half of the community income; she must do so. See *Paul Cavanagh*, 42 B.T.A. 1037 (1940), *affd.* on another issue 125 F.2d 366 (C.A. 9, 1942). * * *

Petitioner refers us to two unreported cases which hold that in the community-property State of California, when a husband has been adjudicated bankrupt, the Commissioner of Internal Revenue may assert the priority of his claim for taxes of the wife against the bankrupt estate which is composed solely of community property. In *The Matter of George Rogers*, U.S.D.C., S.D. Calif., October 18, 1951; In *The Matter of Richard Ryan*, U.S.D.C., S.D. Calif., December 13, 1949. Petitioner relies on dictum in these cases to the effect that a husband, as manager of the community, is personally liable for taxes on his wife's share of community income. This contention is not supported by any citations of authority either in the cases or by petitioner. It is contrary to a line of cases in which we, and other courts, have held that the powers of management conferred upon the husband by community-property laws do not render him personally liable for taxes on his wife's share of the community income. *Poe vs. Seaborn*, 282 U.S. 101 (1930); *Paul Cavanagh*, 42 B.T.A. 1037 (1940), *affd.* on another issue 125 F.2d 366 (C.A. 9, 1942); *Herbert Marshall*, 41 B.T.A. 1064 (1940). The following explanation given by this tribunal in the *Cavanagh* case, pages 1043 and 1044, adequately answers petitioner's contention:

The fact that under the California law the husband has a broad power of control does not detract from the wife's interest. This power is conferred upon him merely as the agent of the community and does not make him the owner of all the com-

munity property and income, nor negative the wife's present interest there as equal coowner. * * *

* * * * *

* * * Clearly, therefore, the petitioner's wife is taxable on one-half of the community income. She is the owner thereof, although not entitled to present possession. * * *

Petitioner argues that her former husband paid taxes on her share of the community income in issue out of community property and, in effect, that any overpayment and resulting refund is community property. She, therefore, urges that the respondent must satisfy her deficiencies out of such "community property". There is no evidence that the overpayment by her former husband was made out of community property. In any event, we need not determine whether it was, or whether the subsequent dissolution of the community and distribution of its property by court decree requires that any refund now due him be treated as his separate, personal property. The decisive factor is that the wife, in a community-property state, is liable for taxes on her share of community income, and she cannot require the Commissioner to assert a claim for such taxes against community property rather than against her personally.

Nor do we agree with petitioner's contention that her former husband's overpayment should now be applied as a set-off to her deficiencies. Petitioner and her former husband each filed individual returns for each of the years here in issue. He paid only what he believed to be the taxes due on his

income. When he discovered an overpayment to have been made, he requested that it be refunded. Even were he joined in this action, we could not direct that his overpayment be used to satisfy his former wife's tax liabilities. We have repeatedly held that each spouse is a separate and distinct taxpayer, and that we cannot require the Commissioner to credit one with a refund due the other. *Irma Jones Hunt*, 47 B.T.A. 829 (1942); *Robert C. Roebeling*, 28 B.T.A. 644, 656 (1933), reversed on other grounds 78 F.2d 444 (C.A. 3, 1935); *H. B. Perine, et al.*, 22 B.T.A. 201 (1931); *Alexander Vayssie*, 8 B.T.A. 587 (1927). Petitioner cites *John W. Preston*, 21 B.T.A. 840 (1930), wherein we might appear to have made an exception to that rule. However, in that case, the two spouses were still married and living together; and we stated that it "would therefore seem proper that the husband should be allowed credit for the total amount of tax paid on the community income returned by both spouses, to the extent that such payment has not been refunded or otherwise credited". We subsequently emphasized in *H. B. Perine et al.*, *supra*, that we could not require the respondent to do so, stating in part:

* * * The spouses became separate and distinct taxpayers under the statute upon the filing of separate returns of the community income, and the situation is no different than it would be if the taxpayers were other than husband and wife. They being separate taxpayers, we lack authority to require the respondent to credit the proposed de-

iciency determined against the wife with an overpayment of tax by the husband. *Alexander Vayssie*, 8 B.T.A. 587. Cf. *John W. Preston*, 21 B.T.A. 840.

We do not consider ourselves bound by any language to the contrary as expressed by a concurring opinion in *Corinne Griffith Marshall vs. U. S.* 88 Ct. Cl. 393, 26 F.Supp. 474 (1939).

Although it may be possible that a "taxpayer may voluntarily agree to have a refund due him used in satisfaction of a tax due from another taxpayer", *Klotz vs. U. S.*, 80 Ct. Cl. 514, 9 F.Supp. 618 (1935), such is not the case here. Petitioner's former husband has clearly indicated by the individual returns originally filed, his amended returns, and his request for refund that his intention is to pay taxes due only on his share of the community income.

We recognize that there is a strong, equitable consideration here in petitioner's favor. In arriving at a division of community property, the Superior Court of California charged petitioner's share with the Federal income taxes previously paid by her former husband. But although he may now recover a refund of an amount previously credited to him in the divorce settlement, we cannot presume to adjust possible inequities therein. Any adjustment in the property-settlement decree is beyond our jurisdiction, and we cannot direct what is to be done with his refund. Petitioner cites *Clayton vs. U. S.*, 70 Ct. Cl. 740, 44 F.2d 427 (1930), certiorari denied 283 U.S. 860 (1931), and *Lattimore et al., vs. U. S.*, 82 Ct. Cl. 97, 12 F.Supp. 895 (1935), as supporting the allocation of an overpayment by one spouse to

a deficiency of the other. However, in each of these cases, the overpayment resulted from a joint return of both spouses, thus clearly indicating that the amount originally paid with the joint return was meant to apply to the tax liabilities of each.

Decision will be entered under Rule 50.

Served June 22, 1954.

[Title of Tax Court and Cause.]

REQUEST FOR LEAVE TO FILE MOTION
FOR FURTHER HEARING TO PRESENT
ADDITIONAL EVIDENCE AND FOR RE-
CONSIDERATION

Petitioner hereby requests leave to file the attached Motion for Further Hearing to Present Additional Evidence and for Reconsideration.

Dated: December 3, 1954.

/s/ DAVID LIVINGSTON,
Attorney for Petitioner

[Endorsed]: Granted December 9, 1954. Signed
Stephen E. Rice, Judge.

[Endorsed]: T.C.U.S. Filed December 7, 1954.

[Title of Tax Court and Cause.]

MOTION FOR FURTHER HEARING TO
PRESENT ADDITIONAL EVIDENCE AND
FOR RECONSIDERATION

Petitioner hereby moves the court for a further hearing to present additional evidence and for reconsideration on the basis of said additional evidence.

The evidence to be presented is the opinion of the District Court of Appeal, State of California, Third Appellate District, rendered in the matter entitled "Ella E. Harrold, Plaintiff and Appellant, vs. Ellsworth Harrold, Defendant and Respondent", and numbered 3 Civil No. 8351 in the files of said District Court of Appeal.

A copy of said opinion is attached hereto and made a part hereof.

Said motion is based on the following grounds:

1. That said opinion of the District Court of Appeal was filed on September 28, 1954, after the opinion of the Tax Court in this cause; that the decision of said District Court of Appeal did not become final until the expiration of 60 days from said September 28, 1954, viz: November 27, 1954. Petitioner did not request leave to present to this Court said opinion and decision prior to the time that it became final for the reason that petitioner filed a petition with the Supreme Court of the

State of California for a hearing of said matter and said petition was not denied until November 24, 1954.

2. That said opinion and decision are material to the issues before the Tax Court for all the reasons set forth in the affidavit of David Livingston attached hereto and made a part hereof.

3. Upon all the other grounds set forth in the affidavit of David Livingston attached hereto.

Dated: December 3, 1954.

/s/ DAVID LIVINGSTON,
Attorney for Petitioner

AFFIDAVIT OF DAVID LIVINGSTON

State of California,
City and County of San Francisco—ss.

David Livingston, being first duly sworn, deposes and says:

1. I am one of the attorneys for the petitioner herein.

2. The opinion of The Tax Court was filed herein on June 22, 1954.

3. Theretofore Mrs. Harrold, the petitioner herein, had commenced an action against Harrold numbered 88995 in the Superior Court of the State of California in and for the County of Sacramento, in which she sought various relief including a declaration of her rights with respect to income taxes

paid by Mr. Harrold on his community earnings for the years 1946, 1947 and part of the year 1948.

In her complaint for said declaratory relief petitioner alleged that the interlocutory decree of divorce entered by said Sacramento court in the divorce proceeding between Mr. and Mrs. Harrold determined the residual property existing as of July 31, 1948, and available for division between the parties; that in this determination deductions were made on account of the state and federal income taxes paid by Harrold on his entire earnings for the years 1946, 1947 and part of 1948; that the amount so deducted was \$61,164.10; that the residual community property after such deductions was determined to be \$1,734.24; that subsequent to the interlocutory decree Harrold filed amended income tax returns reporting only one-half of his earnings on the theory that they were community property and the other one-half was taxable to Mrs. Harrold; that he filed claims for refunds on this basis; that as a result thereof the taxing agencies were about to levy deficiencies against Mrs. Harrold; that Harrold would receive a substantial amount as refunds from the taxing agencies and that Harrold would be subjected to a heavy additional income tax burden.

4. In said action Harrold filed a demurrer and a motion to dismiss. The trial court granted the motion to dismiss without prejudice and judgment of dismissal without prejudice was entered. Petitioner appealed from said judgment.

On September 28, 1954, the District Court of Appeal filed an opinion affirming the judgment of the trial court.

Thereafter Mrs. Harrold filed a petition for a hearing by the Supreme Court of the State of California. The Supreme Court denied this petition for hearing on November 24, 1954 and the decision of the District Court of Appeal became final on November 27, 1954.

Attached hereto and made a part hereof is a copy of the opinion and decision of the District Court of Appeal.

* * * * *

[Note: The District Court Opinion appears in the official advance sheets of the District Court of Appeal in Vol. 127 Advance California Appellate Reports at pages 725-728.]

/s/ DAVID LIVINGSTON

Subscribed and sworn to before me this 3rd day of December, 1954.

[Seal] /s/ HALLIE KELLER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: T.C.U.S. Filed December 9, 1954.

[Endorsed]: T.C.U.S. Denied December 9, 1954.
Signed Stephen S. Rice, Judge.

The Tax Court of the United States
Washington

Docket No. 40953

ELLA E. HARROLD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion filed June 22, 1954, the respondent filed a computation for entry of decision on October 22, 1954. The petitioner filed objections thereto and an alternative computation on November 26, 1954. The computations for settlement under Rule 50 came on for hearing on December 1, 1954, at which time it was ordered that decision be entered in accordance with respondent's computation. Therefore, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years and in the respective amounts as follows:

Year	Deficiency
1946	\$14,718.03
1947	4,972.02
1948	6,886.84

[Seal] /s/ STEPHEN E. RICE,
 Judge

Entered: December 20, 1954.

[Title of of Tax Court and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

1. Ella E. Harrold, of the City and County of San Francisco, State of California, represents that on December 20, 1954, the United States Tax Court rendered a decision that there are deficiencies in income taxes of your petitioner as follows: For the year 1946, \$14,718.03; for the year 1947, \$4,972.02; and for the year 1948, \$6,886.84; and petitioner asks a review of said decision by this Court.

2. Petitioner further represents that she is a citizen of the United States and an inhabitant of the City and County of San Francisco, State of California; that her returns for Federal income tax purposes for the taxable years 1946, 1947 and 1948 were made to the Collector of Internal Revenue for the First District of California, which is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

3. The nature of the controversy is as follows:

Petitioner and her former husband, Ellsworth Harrold, residents of California, filed individual returns for the years 1946, 1947 and 1948.

During said years petitioner and Mr. Harrold were married and lived together until on or about March 25, 1948, when they separated and a suit for divorce was filed by petitioner in the Superior

Court of the State of California in and for the County of Sacramento.

Prior to 1946 Mr. Harrold owned two (2) business enterprises which were his separate property. In 1946 he procured them to be separately incorporated and the shares of stock thereof were issued to him. The net income of said businesses up to the time of the incorporation and the salary received thereafter from the corporations were reported by Mr. Harrold as his separate income in his Federal income tax returns during the years 1946, 1947 and 1948. Mr. Harrold paid the taxes on this income, together with income received by him from various other sources. None of said income or salary was reported as income by the petitioner in the returns filed by her.

In the divorce action the Superior Court determined the amount of income attributable to Mr. Harrold's personal services during the years 1946, 1947 and 1948, and held that this was community property. The court then proceeded to compute the amount of community property on the basis of Harrold's earnings less living expenses. The balance was \$62,898.34. Then the court allotted to Mr. Harrold \$61,164.10 on account of income taxes which he had paid during the years above mentioned. The result was that the community property was virtually exhausted. Mrs. Harrold was awarded \$867.12, one-half of the remainder.

The interlocutory decree of divorce embodying such award was entered by the Sacramento Superior Court on February 15, 1949.

Subsequent to the entry of the decree Mr. Harrold filed with the Internal Revenue Bureau amended income tax returns for 1946, 1947 and 1948. In said returns he reported only one-half of the salary and income which was attributable to his personal services.

He also filed claims for refund of a portion of the taxes paid for said years based on the theory that he overstated his income by including in his original returns Mrs. Harrold's community share thereof.

As the result of Mr. Harrold's claims for refund the Commissioner re-opened Mrs. Harrold's tax returns and determined that the remaining one-half of Harrold's income should be added to the income reported by Mrs. Harrold for the years 1946, 1947 and 1948. The Commissioner levied deficiencies accordingly. The Tax Court has upheld the deficiencies.

The amount of the refunds which would be payable to Harrold on the basis of his amended returns substantially exceeds the amount of the deficiencies assessed against Mrs. Harrold for the period involved.

While the matter was pending in the Bureau of Internal Revenue Mrs. Harrold commenced an action in the Sacramento Superior Court for relief against the consequences of Harrold's change of position. She prayed in the alternative (1) that by reason of Harrold's change of position Mrs. Har-

rold was entitled to a redetermination of the amount of the residue of the community property, or (2) that the court make a declaratory judgment to the effect that when refunds were collected by Harrold, Mrs. Harrold would be entitled to participate on some equitable basis that would include the satisfaction of the deficiencies assessed against her.

The complaint was dismissed by the Superior Court.

Mrs. Harrold appealed to the District Court of Appeal of California. The judgment of dismissal was affirmed. The opinion of the District Court of Appeal states that Mrs. Harrold's claim is barred by the principle of *res judicata* and that the events which occurred after the divorce decree did not affect the operation of the rule (*Harrold vs. Harrold*, 127 A.C.A. 725; 274 P.2d 183.)

Thereafter, a petition for hearing by the Supreme Court of California was filed and denied.

Petitioner contends that the Commissioner erred in charging her with one-half of the community income received by Mr. Harrold during 1946, 1947 and 1948, because the entire tax on this income has already been paid by Mr. Harrold as the manager of the community out of community funds and has been charged against community funds.

Petitioner further contends that in determining the deficiency to be assessed and paid by petitioner for 1948 the Commissioner erred in not allowing credit to petitioner for one-half the income tax

withheld from Mr. Harrold's salary during the year 1948.

4. As a basis for review, petitioner makes the following assignments of error:

(a) The Tax Court erred in holding that the petitioner was chargeable with one-half of the community income attributable to Mr. Harrold's services for the years 1946, 1947 and 1948.

(b) The Tax Court erred in holding that the tax on said community income had not already been paid by petitioner's husband, who as the manager of the community, was personally liable for the taxes on petitioner's share of the community income.

(c) The Tax Court erred in holding that petitioner's husband had not already paid the taxes on her share of the community income out of or with community property, which community property was responsible for the payment of petitioner's taxes on community income.

(d) The Tax Court erred in holding that the tax on petitioner's share of the community income had not been paid by petitioner's husband and charged against community funds.

(e) The Tax Court erred in holding that petitioner's husband's overpayment can not be applied as a set-off to petitioner's deficiency.

(f) The Tax Court erred in approving that portion of the deficiency for the taxable years 1946,

1947 and 1948 attributable to the community income earned by Mr. Harrold during said years.

(g) The Tax Court erred in denying petitioner's motion for further hearing to present additional evidence and for reconsideration.

(h) The Tax Court erred in ordering that decision be entered under Rule 50 in accordance with the Commissioner's computation as to the deficiency to be assessed against and paid by petitioner for the year 1948 in that no credit was allowed to petitioner for one-half the income tax withheld from Mr. Harrold's salary during the year 1948.

Wherefore, your petitioner prays that this Court review said decision of the United States Tax Court pursuant to the applicable statutes and the rules of this Court.

Dated: January 31, 1955.

/s/ DAVID LIVINGSTON,
Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed February 1, 1955.

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To the Chief Counsel, Internal Revenue Service,
Washington, D. C., Attorney for Respondent:

You Are Hereby Notified that on February 1, 1955, petitioner filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of said Tax Court rendered on December 20, 1954, in the above-entitled case. Attached hereto is a copy of said petition for review.

Dated: February 4, 1955.

DAVID LIVINGSTON,
Attorney for Petitioner

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed February 8, 1955.

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit is extended to May 2, 1955.

Dated: Washington, D. C., February 8, 1955.

[Seal] /s/ JOHN W. KERN,
 Chief Judge

Served March 9, 1955.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before the Tax Court of the United States entitled: "Ella E. Harrold, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 40953," and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 16th day of March, 1955.

[Seal] /s/ VICTOR S. MERSCH,
 Clerk, The Tax Court of the
 United States

allowed to Harrold \$61,164.10 on account of taxes on his earnings which he had paid during the years above mentioned. Thus, the community property was virtually exhausted.

After the interlocutory decree of divorce, Harrold filed amended returns for the years 1946 to 1948, inclusive. In these returns he reversed the position which he had theretofore taken, and instead of reporting his entire earnings he reported only one-half, describing it as community income. The Commissioner investigated Mrs. Harrold's returns, which for obvious reasons had not reported any part of her husband's income. The Commissioner added the other one-half of such income to her returns and assessed deficiencies accordingly. These have been upheld by the Tax Court.

In addition to the amended returns, Harrold filed claims for refund of the difference in taxes. The amount of these claims would, if allowed, exceed the total of the deficiencies levied against Mrs. Harrold for the period involved.

When the Commissioner notified Mrs. Harrold of the proposed deficiencies, she commenced a second suit in the California Superior Court seeking a determination that she was entitled to protection from Harrold against the proposed deficiencies. The Superior Court dismissed the action. Mrs. Harrold appealed to the District Court of Appeal of California. The order of dismissal was affirmed on the ground that divorce decree was *res judicata* and the bar to the second action. A petition for a hearing in the Supreme Court of California was denied.

On the basis of the foregoing facts, it follows that the taxes upon the income have been paid. In California the community income is liable for taxes thereon. In the divorce action the community income was charged with and satisfied the taxes. The taxes are therefore paid on such income. Hence, the Commissioner erred in levying the deficiencies against Mrs. Harrold. For the same reason the Commissioner should reject the claims of Harrold for refund, or in the alternative should set off the deficiencies against the claims for refund.

Dated: June 16, 1955.

DAVID LIVINGSTON,
HAROLD R. FARROW,
JAMES R. MANSFIELD,
A. L. BJORKLAND, JR.,

/s/ By DAVID LIVINGSTON,
Attorneys for Petitioner

[Endorsed]: Filed Jun. 21, 1955. Paul P. O'Brien,
Clerk.